

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Adversary No. 14-01840-smb

4 - - - - - x

5 In the Matter of:

6 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF B.,

7 Plaintiff

8 v.

9 SUSANNE STONE MARSHALL, ET AL.,

10 Defendants

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14 U.S. Bankruptcy Court

15 One Bowling Green

16 New York, New York

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18 May 22, 2014

19 10:02 AM

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22 B E F O R E :

23 HON STUART M. BERNSTEIN

24 U.S. BANKRUPTCY JUDGE

25 ECR OPERATOR: F. FERGUSON

1 Hearing re: Picower's Motion to Intervene Pursuant to FRCP
2 24(b)

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25 Transcribed by: Jamie Gallagher

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P R O C E E D I N G S

THE COURT: Good morning. Picard v. Marshall.

Good morning.

MS. HARRIS: Good morning, Your Honor.

MR. KWON: Good morning, Your Honor.

THE COURT: Go ahead.

MS. HARRIS: I'm Marcy Harris from Schulte Roth &
Zabel. With me is Michael Kwon of our firm.

THE COURT: Thank you.

MS. HARRIS: Shall I continue?

THE COURT: Yeah. There's --

MS. HARRIS: Okay.

THE COURT: -- no one else here.

MS. HARRIS: Huh?

THE COURT: There's no one else here.

MS. HARRIS: Intimate session this morning.

THE COURT: Did you -- well, actually I'm -- have
you heard from the defendants?

MS. HARRIS: I have not.

THE COURT: Okay.

MS. HARRIS: And they didn't object to the motion
or file anything.

THE COURT: And the trustee didn't object either I
take it?

MS. HARRIS: No, the trustee is obviously here.

1 THE COURT: Okay. Go ahead.

2 MS. HARRIS: So, I know the Court is familiar with
3 the facts of the case, there's just a few I want to set out
4 right now because I think it's relevant to our motion to
5 intervene.

6 THE COURT: Go ahead.

7 MS. HARRIS: So, we represent the Picower parties.
8 The Picowers were customers of BLMIS. They were sued by the
9 trustee in May 2009 for return of their net withdrawals.
10 The Picowers reached a settlement with the trustee after
11 extensive negotiations, with the result that they paid back
12 100 percent of their net withdrawals. This Court approved
13 the settlement in January 2012. And part of the order
14 approving the settlement contained a permanent injunction
15 enjoining persons from bringing claims that the trustee
16 brought or could have brought against the Picower parties.

17 The Picowers are direct beneficiaries of the
18 permanent injunction and the class action plaintiffs, the
19 Fox Marshall Group and the Goldman plaintiffs, seek now to
20 file complaints against the Picower parties that we believe
21 violate the permanent injunction in that they're duplicative
22 and derivative of the claims that the trustee brought and
23 settled with us.

24 THE COURT: What's the status of the proceedings
25 in Florida?

1 MS. HARRIS: All right, there's two District Court
2 proceedings and one appeal in the Eleventh Circuit. The
3 case before Judge Ryskamp in District Court, which was
4 brought by the Fox Marshall plaintiffs, is stayed pending
5 resolution -- determination by this Court.

6 THE COURT: But there was an appeal and a motion
7 for an expedited appeal --

8 MS. HARRIS: Yes, the Court -- the Eleventh
9 Circuit denied the motion for expedited appeal, I think by
10 order dated May 7th, so just after the last hearing in this
11 Court, denied the motion for an injunction pending appeal,
12 denied the motion of the Goldman parties to intervene in the
13 appeal to seek disqualification. The Eleventh Circuit
14 denied the motion of the Goldman parties to remand the
15 disqualification issue so that the District Court could
16 address it, denied appellants requests to impose sanctions,
17 the Beasley firm, the one counsel to Goldmans, and ordered
18 that the jurisdiction issue that the Picowers had raised
19 challenging the appeal -- the basis for the appeal because
20 it was interlocutory, that could be heard at the regular
21 time that the appeal itself was heard.

22 Since then, the appellees have filed their opening
23 brief. We're in the process of responding.

24 THE COURT: Appellants.

25 MS. HARRIS: The appellants.

1 THE COURT: You said the appellees.

2 MS. HARRIS: Yes. So, that's what's going on in
3 Florida. The other Court --

4 THE COURT: What's the basis of the --

5 MS. HARRIS: I'm sorry.

6 THE COURT: I guess it's a denial of an
7 injunction, is that what --

8 MS. HARRIS: Well, we don't believe it is. It was
9 the denial of a stay so that they could hold an injunctive
10 hearing. An --

11 THE COURT: In other words, what order are they
12 appealing it from in Florida?

13 MS. HARRIS: They were appealing from denial of a
14 motion to lift the stay so that they could have an emergency
15 hearing. The Court didn't address the --

16 THE COURT: Okay.

17 MS. HARRIS: The Court didn't grant that relief
18 and so it's in dispute exactly what they are appealing from
19 and whether, therefore, they have a right or not.

20 THE COURT: With respect to the other action, the
21 Goldman action, have there been --

22 MS. HARRIS: That's before Judge O'Mara. There's
23 been no proceedings whatsoever. The -- there is a motion
24 that's fully briefed. That was to dismiss for insufficient
25 service and to stay pending determination by this Court.

1 THE COURT: Has that motion been argued or will it
2 be argued, or will it be submitted? Do you know?

3 MS. HARRIS: I don't know. I don't think there's
4 argument.

5 THE COURT: Okay.

6 MS. HARRIS: There's been no request for it, but
7 none of the substantive issues have been addressed and the
8 issue that was argued here last week has not been briefed.

9 So, the Picowers have moved to intervene in this
10 action that the trustee brought to protect their interests.
11 Plainly, their interests are going to be affected by the
12 outcome of this case. The Picowers' interests, the
13 trustee's interests substantially overlap, but they're not
14 identical, and we just want the ability to be present, to
15 have a right to be heard, and to take action as we see fit
16 to protect the Picowers.

17 Rule 24(b)(2), the permissive intervention statute
18 is to be liberally construed in favor of intervention. We
19 meet the test for permissive intervention in that our motion
20 to intervene was timely. It was filed within two months of
21 the trustee's action before there were any answers filed in
22 this case. We don't seek to delay any proceedings here.
23 We're not going to re-brief the issues that have been argued
24 if we were permitted to intervene. We would adopt the
25 arguments that the trustee has made in writing and orally.

1 We just want to preserve our right to be heard should our
2 interest diverge from the trustee, should we want to add or
3 supplement or bring to the Court something from our
4 perspective, and certainly to be able to participate in any
5 appeal if one is taken.

6 We share -- the Picower parties share common
7 questions of law and fact with the case that's already been
8 brought. We've adopted the complaint, or we would adopt the
9 complaint of the trustee. We, too, believe that the
10 complaints that the class action plaintiffs seek to file and
11 litigate are barred by the permanent injunction and the
12 stays that have been entered by this Court. So, there's no
13 prejudice to any party. They didn't object. Obviously,
14 they're not here today. There would be prejudice to the
15 Picowers if they were not permitted to have a right to
16 participate and be at the table.

17 We seek the same relief, obviously, as the trustee
18 has sought. And so, unless the Court has questions, we
19 request that our motion be granted.

20 THE COURT: Is there anyone in the Court today who
21 wants to be heard in connection with the motion? Hearing no
22 response, I'll grant the motion.

23 You certainly share the identical position that
24 the trustee has for the time being anyway, and that is
25 whether the actions in Florida are barred by the injunction

1 previously entered by the Court in connection with the
2 Picower settlement with the estate. I see that there's no
3 objection and you're right, I guess your interests and the
4 trustee's might diverge. The trustee might decide to just
5 walk away from this or reach a separate resolution and it's
6 really your ox that's being gourd by this -- these lawsuits
7 in Florida.

8 So, I'll grant the motion. You can submit an
9 order. Thank you very much.

10 MS. HARRIS: Thank you. Thank you, your Honor.

11 MR. KWON: Thank you, Your Honor.

12 (Proceedings concluded at 10:11 a.m.)
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I N D E X

RULINGS

	Page	Line
Picower's Motion to Intervene Pursuant to	9	22
FRCP 24(b)		

C E R T I F I C A T I O N

I, Jamie Gallagher, certify that the foregoing transcript is
a true and accurate record of the proceedings.

Jamie Gallagher

Digitally signed by Jamie Gallagher
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Date: May 28, 2014